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United States Circuit Court of Appeals

For the Ninth Circuit

HARRY W. ELLIOTT,
Plaintiff in Error,

vs.

AMERICAN SURETY COMPANY OF NEW YORK (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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This action by the plaintiff in error is one for damages for false imprisonment against the defendant in error as surety on the official bond of Richard R. Veale, Sheriff of Contra Costa County, California.

No special damages are alleged, but the plaintiff in error merely asks for general damages for injury to his good name and reputation and for shame, disgrace and humiliation attendant upon such arrest, and alleges that he has suffered in mind and body thereby. The answer of the defendant sets up probable cause as a defense and denies that plaintiff was damaged.

The case was tried before the Southern Division of the United States District Court for the Northern District of California, and the trial was concluded before a jury on the 21st day of November, 1921.

It may be taken as beyond question that the jury were properly instructed by the Court, as no instructions have been attacked by the plaintiff in error. The jury rendered the following verdict:

> "We, the jury, find in favor of the defendant, *provide,* however, we award the plaintiff seven hundred and fifty dollars damages."

The Court entered its judgment upon the verdict in favor of plaintiff in the sum of $750.00 and costs.

A number of errors are assigned by the plaintiff in error, but, as stated by counsel in their brief, there is really only one question before this Court, and that is, whether or not the verdict of the jury in this case is a sufficient verdict to justify the judgment entered.

Argument.

It is our contention that the verdict can only be read as a verdict in favor of plaintiff in the sum of $750.00. The jury deliberated upon the evidence and found the damages suffered by the plaintiff to be measured by the amount awarded him.

At the outset we might say that there is a marked line of distinction between *what the jury meant by*

their verdict and why they couched the verdict in the language quoted. No one can read this verdict without instantly coming to the conclusion that the jury intended to and did award plaintiff the sum of $750.00 as damages for false imprisonment. We are confident that one can neither read into the verdict any other meaning nor can one give it any other sensible interpretation.

If we should speculate as to *why* the jury couched the verdict in the language which they have, we might venture a score of guesses, one equally convincing as the other, but when it comes to the matter of *what the jury intended,* that intent is clearly set forth.

A verdict of a jury after a trial should not be lightly set aside, and especially where there is not one word of criticism by counsel concerning irregularity of the trial, admission of evidence, or any other incident to which they take exception.

The rule is clearly stated in *27 Ruling Case Law,* page 858, Section 30, being a portion of the very paragraph quoted in the brief of plaintiff in error on file herein, and is as follows:

> "Although defective in form, if it substantially finds the question in issue in such a way as will enable the Court to intelligently pronounce judgment thereon for one or the other parties according to the manifest intention of the jury, *it is sufficiently certain.* * * * Moreover, every reasonable construction should be adopted for the purpose of working the verdict into form so as to make it serve."

This same rule in different language is stated in *38 Cyc.* 1877, as follows:

> "A verdict will not generally be held invalid for mere informality if its meaning is sufficiently intelligible to be the basis of a legal judgment, or if it can be made definite and certain without resorting to facts *aliunde,* as by a reference to the pleadings, evidence or record. If possible a construction will be given to the verdict which will make it effective rather than void, *ut res magis valeat quam pereat;* but a verdict is bad where it is so uncertain that it cannot be clearly ascertained what, if any, issues were passed on by the jury * * *."

In *29 Am. & Eng. Encyc. of Law,* 2nd Ed., page 1017, the following appears:

> "Courts are inclined to favor the validity of a verdict, and no matter what requisite may be apparently lacking, it will be supported if, from the terms of the finding and the contents of the record, enough material can be gathered for the formation of a complete verdict in all its essential details."

And again, in *29 Am. & Eng. Encyc. of Law,* 2nd Ed., page 1038:

> "The form of a verdict seems to be immaterial so the intention of the jury is sufficiently apparent. Irregularities or peculiarities of expression and technical inaccuracies will alike be disregarded if the verdict, notwithstanding these defects, is intelligible."

In *Kelly v. Bell,* 172 Ind. 591, at 597, the Court says:

> "The rule in this State is that a motion for a *venire de novo* will not be sustained unless

> the verdict is so defective and uncertain upon its face that no judgment can be pronounced upon it. A verdict, however informal, is good if the Court can understand it. It is to have a reasonable construction and must not be avoided except from necessity."

In *Pittsburg C. C. & St. L. Ry. Co. v. Darlington,* 111 S. W. 360(Ky.), the Court, after stating that juries are gathered from every walk of life and that their verdicts were rarely couched in the terminology of the law, says:

> "Hence Courts view the findings of the jury with great leniency and every reasonable presumption is indulged in aid of a general verdict. The main thing is to get an understanding of what the jury intended. Their intent is to be sought for in the language they used in their verdict *interpreted in the light of the record.* Resort may be had to the pleadings or other parts of the record to see what the jury meant by their verdict."

In *Dunlop v. Hayden,* 29 Ind. 303, in an action for money alleged to have been fraudulently obtained by the defendant, the jury rendered a verdict as follows:

> "We, the jury, find for the plaintiff and assess his damages at $275.00. The jury in their verdict decline to impute improper motives to the defendant in the matter in controversy."

It was held by the Court that this was not an irregular or inconsistent verdict, the Court on page 304 saying:

> "Even, however, if the latter clause was a finding, it would be the duty of this Court to

> let the general verdict stand if by any hypothesis it could be reconciled with the special finding."

Weaver v. City of Cherryvale, 170 Pac. 997 (Kan.), was a case where the plaintiff sued the city for negligence in the maintenance of a sidewalk, by reason of which plaintiff sustained injuries. She was awarded a verdict for $675.00. The jury also made findings showing that the plaintiff was contributorily negligent, but the Court held that there was no conflict between the findings and the verdict.

In *People v. Holmes,* 118 Cal. 444, defendants were jointly indicted and tried for murder. They were convicted of involuntary manslaughter and sentenced to the State penitentiary. It was claimed that the verdict was erroneous, and the portion with which we are concerned read as follows:

> "Second. We find a verdict of 'guilty' against all the others named in the indictment, to wit, against James Holmes, William Starr, D. Dunn, Neal Collins, W. Dowling, E. G. Waltz, and Walter McCoy, and find a verdict of 'involuntary manslaughter', 'not a felony', as charged and laid down by the court under the head of 'involuntary manslaughter', and pray the extreme mercy of the court in its sentence and punishment; and so say we all."

The Supreme Court in passing upon this verdict says:

> "It is certainly informal, and the words 'not a felony', if given effect, contradict the words 'guilty of involuntary manslaughter', which is a felony. * * * But whatever may have

> been the intention of the jury, by no possible construction could we reach the conclusion that the jury meant to acquit the defendants. * * * There is no good reason why the verdict of a jury cannot have a reasonable construction and be given effect according to its manifest intention. The words 'not a felony' should be rejected as surplusage and the general verdict of 'guilty of involuntary manslaughter' should stand as the verdict."

In ~~Lewis v. Childers~~ Bartlett v. Keogh, 68 N. W. 875 (Wis.), the Court held that a verdict is sufficient, though uncertain on its face, when it is rendered certain by being construed in connection with the issues joined by the pleading.

Considered in the light of the foregoing authorities and the illustrations referred to, it will be seen that the verdict in question granted to plaintiff in error full damages as assessed by the jury and should not be set aside merely by reason of the use of an ill-advised expression by the jury when their intent is perfectly clear.

As the plaintiff in error has brought no objections to this Court to any evidence produced at the trial, no exceptions to any ruling or instruction of the Court, no claim of any irregularity in the course of the trial, it must be taken conclusively that the issue in the case was fully and fairly tried and presented to the jury; that they were properly instructed by the Court as to the law applicable to the case, and that after deliberation they found the plaintiff entitled to damages in the sum of $750.00.

There can be no question but that the jury fixed plaintiff's damages at $750.00, because they so state in their verdict. All the plaintiff prayed for in his complaint was money damages, and the only grievance that he can possibly have is that the award was too small, and the sufficiency of the amount should not be attacked in this proceeding where the intention of the jury is so clear as set forth in the verdict in question.

If the jury had not mentioned the word "defendant" in the verdict there cannot be the slightest presumption that plaintiff in error would have received a larger award. He would still be as he is now, the winning party; he is really in no way prejudiced by the verdict, because he has been awarded all the jury says he is entitled to.

We are not considering a writ of error prosecuted by the defendant, the losing party, but by the plaintiff, the prevailing party, who has received at the hands of the jury, after a fair trial, just what he asked—a money judgment—and the jury awarded him what in their judgment he was entitled to. We contend that the plaintiff in error cannot attack the verdict or judgment in this proceeding; that the attack, if at all, must be upon the judgment on the ground that it is not justified by the verdict; that the Court did not properly interpret or construe the verdict in the entry of the judgment.

But such attack is not open to the plaintiff in error, because he is the prevailing party; if any

error was made by the Court in construing the verdict, such error was favorable to plaintiff in error.

We do not want to be understood to claim that a party may never complain of a *judgment* in his favor, but only that such complaint must be made in the proper manner. But what we do contend is that a party cannot complain of an *error* favorable to himself.

> "Error favorable to an appellant cannot be reviewed, whether or not it appears in the verdict, findings, conclusions of law, or judgment or decree" * * *.
>
> *4 C. J.* 921-922, Sec. 2892.

> "Error in the form and not in the substance of a verdict is not grounds for reversal. Nor in any event will a judgment be reversed for error in a verdict, whatever its character, if it is not prejudicial to appellant."
>
> *4 C. J.* 1054, Sec. 3038.

And the same rule is announced by Section 475 *Code of Civil Procedure* of this State, as follows:

> "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings, which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been

> probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

It is possible that the defendant in error, the loser in this action, could complain of an alleged error of the Court in construing the verdict in this case, as such construction, if erroneous, would be prejudicial to it, but the plaintiff in error cannot complain because the error, if any, was favorable to him.

CASES CITED IN BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error cites from *27 Ruling Case Law,* page 858, paragraph 30, to the effect that a jury cannot find for both plaintiff and defendant, but an examination of the rest of the text and cases cited will not uphold the ruling.

In *Grotton v. Glidden,* 84 Me. 589, cited by counsel, defendant was charged with assault and battery. The jury found the defendant not guilty in the form and manner charged, but assessed damages in favor of the plaintiff in the sum of $50.00. The Court instructed the jury to correct the form of their verdict, and they then brought in a general verdict for plaintiff in the sum of $50.00. The only point decided in that case was that the Court may instruct the jury to correct a verdict if it is not in proper form. The case does not hold that a judgment for plaintiff could not have been entered upon that verdict.

East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., 249 Fed. 439, from which counsel quotes at length, is plainly distinguishable from the case at bar. That case was an action on an open account for the reasonable value of labor and services. Defendant counterclaimed for breach of an alleged contract. The jury found that the defendant was indebted to plaintiff for the sum of $4594.79, and further found damages for defendant under the counterclaim, in the sum of $1000.00. So the jury found in effect that there was an open account running to plaintiff, and no special contract, and then followed a finding that there was a special contract breached by the plaintiff. This is a very different situation from the case at bar, because the jury first finds there was no special contract, and then immediately finds that there was a contract. In other words, if they found for the open account, necessarily they must find against a special contract, and if they found that the amount stated in plaintiff's complaint was due under the open account, they could not, of course, reduce the amount of the judgment by deducting what they found due for breach of a special contract which their former finding declared did not exist. In that case plaintiff did not get all he was entitled to, while in the case at bar the jury awarded the plaintiff every dollar they thought he was damaged, and their peculiar wording did not reduce that damage in any way.

The same distinction applies to *Ruth v. McPherson,* 150 Mo. App. 694; 131 S. W. 474, because the jury found a money judgment for plaintiff, and then found a larger amount in favor of defendant by reason of plaintiff's negligence, and the judgment was the difference between the two amounts, thus resulting in cutting down one of the amounts awarded, and entirely wiping out the other.

In *Fred Bauer Engineering & Contracting Co. v. Arctic Ice & Storage Co.,* 186 Mo. App. 662; 172 S. W. 417, plaintiff sued on a contract for a stipulated price for work performed, and defendant counterclaimed, demanding damages for failure to do the work properly. The jury rendered a verdict in favor of plaintiff on its claim, and in favor of defendant on its counterclaim for a greater amount. Counsel quotes from that case, but it is evident that we can make the same distinction we have made in the two former cases, and also call the Court's attention to a further portion of the opinion immediately following the portion quoted by counsel, and reading as follows:

> "Here it appears that the contract price for the erection of the tower in question was $1300.00; $621.29 was paid on that, and plaintiff sued for the balance of $678.71. As the record now stands it is denied any further recovery and there is a judgment against it for $800.00. If this is permitted to stand the plaintiff not only receives nothing for the erection of the tower, but is compelled to pay defendant $178.71 in addition, *though the evidence in the record does not make it appear that defendant*

> *suffered damages to the extent of $1400.00 for which it ought to be compensated. It further appears that the defendant did not seek to minimize the damages as the law requires it should have done."* (The italics are ours.)

It will be seen from the above quotation that the verdict was *inconsistent with the evidence,* and not merely questionable as to its intent.

The case of *Joseph Rosenthal v. United States of America,* referred to and quoted from by counsel on pages 10 and 11 of their brief, is certainly not in point. That was a criminal case, and there were two counts in the indictment and only one transaction. If the defendant was found guiltless on one count, it meant that he could not be guilty at all.

In *Pugh v. Bluff City Excursion Co.,* 177 Fed. 399, cited by counsel for plaintiff in error, a most casual reading of the case will show that the verdict was *inconsistent with the evidence,* and not at all inconsistent on its face, because the undisputed testimony was that the damages were much larger than the sum of $1.00. The verdict read:

> "We, the jury, find a verdict for plaintiff and fix the damages at $1.00."

It is very evident that there is no inconsistency whatever on the face of this verdict, and therefore the case is not in point.

In *Glenwood Irrigation Co. v. Vallery,* 248 Fed. 485, there was no dispute as to the *amount* of damages, the jury returning a verdict for a smaller amount. In other words, there was no inconsis-

tency in the verdict other than that it was inconsistent with the undisputed facts before the jury.

The same comment may be made in respect to the *United Press Association v. National Newspaper Assn.*, 254 Fed. 285, cited by counsel.

Apparently a number of cases cited by counsel are only inserted in the brief because they found the words "inconsistent" used in the opinion, but a reading of these cases will show that the verdicts were inconsistent with the evidence only but were regular on the face, and of course in the case at bar there is no evidence before the Court, and necessarily it must be presumed that the evidence justified a verdict for $750.00 for plaintiff, and neither more nor less.

In conclusion, we submit that the verdict in this case is sufficiently clear in form and substance to support the judgment; that plaintiff in error is not prejudiced thereby, and that a new trial should not be granted.

Dated, San Francisco,
May 8, 1922.

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